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In the Supreme Court of the United States

OCTOBER TERM, 1998

ALUMINUM COMPANY OF AMERICA, PETITIONER

v.

ESTHER JONES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an order of the Benefits Review Board that resolves one issue and remands to an administrative law judge for resolution of the remaining issues is a "final order" that may be reviewed by a court of appeals under Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(c).

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OPINIONS BELOW

The order of the court of appeals dismissing the appeal for lack of jurisdiction (Pet. App. 3a) is not reported. The decision and order of the Benefits Review Board (Pet. App. 4a-15a) is reported at 31 Ben. Rev. Bd. Serv. (MB) 130. The decision and order of the administrative law judge (Pet. App. 16a-24a) is reported at 30 Ben. Rev. Bd. Serv. (MB) 741.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1998. A petition for rehearing was denied on November 12, 1998. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on February 9, 1999. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, provides compensation for work-related injuries that result in the disability or death of covered employees. 33 U.S.C. 908, 909. To be covered under the LHWCA, an injured employee must meet two requirements. The first, the status requirement, is that the employee was engaged in maritime employment. 33 U.S.C. 902(3). The second, the situs requirement, is that the injury occurred upon the navigable waters of the United States, defined by the LHWCA to include certain areas adjoining navigable waters. 33 U.S.C. 903(a).

Claims are decided by deputy commissioners appointed by the Secretary of Labor. 33 U.S.C. 919(a), 940 (now called district directors, see 20 C.F.R. 701.301(7)). Upon the request of an interested party, however, the deputy commissioner must order a hearing before an administrative law judge (ALJ) to decide a disputed claim. 33 U.S.C. 919(c) and (d). An ALJ's decision may be appealed to the Benefits Review Board, a tribunal within the Department of Labor. 33 U.S.C. 921(b). "Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals." 33 U.S.C. 921(c).

2. From 1972 through 1980, petitioner Aluminum Company of America employed Charles Jones, Jr., deceased husband of respondent Esther Jones. Pet. App. 5a, 17a. Mr. Jones worked as a millwright welder and general mechanic at petitioner's plant on the Mobile River, a navigable waterway. *Id.* at 17a.

Among other job duties, Mr. Jones repaired and maintained petitioner's conveyor belts, which transported bauxite from a conveyor belt at the Alabama state docks to storage buildings in petitioner's dockside manufacturing plant. *Id.* at 7a-8a, 21a.

In 1994, Mrs. Jones filed a claim for death benefits under the LHWCA, 33 U.S.C. 909, which petitioner contested. Pet. 4. In the administrative proceeding before the ALJ, the parties disputed whether Mr. Jones satisfied the situs and status requirements; whether he had asbestosis; whether the asbestosis, if present, was related to asbestos exposure with petitioner; whether the asbestosis played a part in his fatal lung cancer; and whether petitioner was entitled to second injury relief under the Act, 33 U.S.C. 908(f). Pet. App. 17a-18a. Addressing the status issue only, the ALJ ruled that Mr. Jones did not satisfy the status requirement and denied the claim. *Id.* at 24a. Given his determination on that issue, the ALJ concluded that the "other considerations" in the case were "moot." *Ibid.*

Relying in large part on *Chesapeake & Ohio Railway* v. *Schwalb*, 493 U.S. 40 (1989), the Benefits Review Board reversed the ALJ's status determination and vacated his Decision and Order. Pet. App. 4a-15a. The Board remanded the case for resolution of the remaining factual and legal issues. *Id.* at 14a.

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. In dismissing the petition for review, the court held that the Board's order remanding the case for further proceedings before the ALJ was not a final order, and, therefore, the court lacked jurisdiction to review the case under 33 U.S.C. 921(c). Pet. App. 3a. The court subsequently denied petitioner's request for rehearing. *Id.* at 1a.

ARGUMENT

The court of appeals correctly dismissed petitioner's appeal for lack of jurisdiction under 33 U.S.C. 921(c). That section permits court of appeals review of a "final order of the Board." The Board's remand order here did not end the dispute on the merits and thus is not a final order. The court's dismissal is consistent with a long line of court of appeals decisions and does not conflict with any decision of this Court. Further review is therefore not warranted.

1. The LHWCA provides that "[a]ny person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals." 33 U.S.C. 921(c). The courts of appeals have consistently held that the LHWCA's finality requirement mirrors the finality requirement of 28 U.S.C. 1291, which provides that "[t]he courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts." See, *e.g.*, *Bish* v. *Brady-Hamilton Stevedore Co.*, 880 F.2d 1135, 1137 (9th Cir. 1989); *Director, OWCP* v. *Bath Iron Works Corp.*, 853 F.2d 11, 13 (1st Cir. 1988); *Youghiogheny & Ohio Coal Co.* v. *Baker*, 815 F.2d 422, 424 n.2 (6th Cir. 1987); *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399, 400 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984); *Freeman United Coal Mining Co.* v. *Director, OWCP*, 721 F.2d 629, 630 (7th Cir. 1983); *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 590 F.2d 1267, 1268 (4th Cir. 1978); *Sun Shipbuilding & Dry Dock Co.* v. *Benefits Review Bd.*, 535 F.2d 758, 760 (3d Cir. 1976) (per curiam); see also *Redden* v. *Director, OWCP*, 825 F.2d 337, 338 (11th Cir. 1987) (per curiam); *WMATA* v. *Director, OWCP*, 824 F.2d 94, 95 (D.C. Cir. 1987) (per curiam).

"[A] decision is ordinarily considered final and appealable under § 1291 only if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (citations omitted); accord *Newpark Shipbuilding*, 723 F.2d at 400, 404, 406 (applying this "well-settled general rule" to LHWCA appeal). Conversely, "an order remanding a LHWCA claim to an ALJ for further findings is not, in general, immediately appealable." *Bath Iron Works*, 853 F.2d at 16.

As under Section 1291, the purpose of the finality requirement under the LHWCA is principally the "[a]voidance of the mischief of multiple appeals in a single litigation." *Bath Iron Works*, 853 F.2d at 13. Applying that finality principle, the courts of appeals have routinely dismissed petitions for review of Board orders remanding to the administrative law judge (ALJ) for further proceedings, because the orders "did not close out the case[s] * * * [but] contemplated that something further needed to be done." *Bath Iron Works*, 853 F.2d at 14.

2. a. Under Section 1291, a party may also immediately appeal from "a narrow class of collateral orders which * * * 'conclusively determine [a] disputed question' that is 'completely separate from the merits of the action,' 'effectively unreviewable on appeal from a final judgment,' and 'too important to be denied review.'" *Quackenbush*, 517 U.S. at 712 (citations omitted); see also *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Several courts of appeals have recognized that the collateral order exception could apply to an appeal of a Board order under Section 921(c) in an appropriate case. See *Bish*, 880 F.2d at 1137-1138; *Bath Iron Works*, 853 F.2d at 13 n.4, 15;

Redden, 825 F.2d at 338; *WMATA*, 824 F.2d at 95-96; *Newport News*, 590 F.2d at 1268; *Sun Shipbuilding*, 535 F.2d at 760-761. None has found immediate review appropriate, however, when issues of liability or damages remain to be decided, because "[a]dditional legal issues may arise on the remand to the administrative law judge, and no rights to review will be lost by [the appellant] if it must first litigate the [remand] issue[s] * * * before the administrative agency." *Sun Shipbuilding*, 535 F.2d at 761. In those cases, "[j]udicial economy, the interest underlying the finality rule, will be better served by postponing review" until all issues in the case have been adjudicated. *Ibid.*

b. The Board order here is a typical remand order that does not qualify for the collateral order exception. Although the Board decided the status issue, other issues that may be determinative of the outcome in the case (and thus render review of the status issue in the court of appeals unnecessary) remain unresolved and require fact-finding by the ALJ. Pet. App. 14a, 17a-18a, 24a. Also, the status issue is a fundamental part of the underlying claim—*i.e.*, whether LHWCA coverage is available—and is subject to review on appeal of the ALJ's final decision. See, *e.g.*, *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414 (1985) (reversing lower court status findings). The court below, therefore, correctly applied the well established rule for judging the finality of Board orders. Review of the court's application of that rule to the particular circumstances of this case is not warranted.

c. Contrary to the well established rule applied by the court of appeals, petitioner appears to advocate a standard that would permit court of appeals review of any interlocutory Board order that either conclusively resolves an important legal issue (Pet. 17) or is alleged

to exceed the Board's scope of review (*id.* at 15). Petitioner's standard would encompass most, if not all, Board remands. For example, almost any appeal may be framed as a contention that the Board exceeded the substantial evidence scope of review. See 33 U.S.C. 921(b)(3). As a result, the workload of the courts of appeals would greatly increase as they considered "appeals that, had the trial simply proceeded, would have turned out to be unnecessary." *Johnson* v. *Jones*, 515 U.S. 304, 309 (1995). More fundamentally, the recommended standard, lacking any meaningful limitation, conflicts with the plain language of the statute, which restricts review to "final" Board orders. See *Bath Iron Works*, 853 F.2d at 13 ("No matter how tantalizing a problem may be, a federal appellate court cannot scratch intellectual itches unless it has jurisdiction to reach them. And in this instance, we are persuaded that jurisdictional constraints foreclose us from inquiring, here and now, into the merits."); cf. *Bish*, 880 F.2d at 1138 ("pragmatic finality test" inapplicable to LHWCA because 33 U.S.C. 921(c) does not include analog to interlocutory review under 28 U.S.C. 1292(b)); *Newpark Shipbuilding*, 723 F.2d at 407 (overruling circuit precedent that had adopted pragmatic finality test in LHWCA case).

d. The cases that petitioner cites as conflicting with the decision of the court of appeals in this case (Pet. 14-15) are fully consistent with that decision. Both *Sea-Land Service, Inc.* v. *Director, OWCP*, 540 F.2d 629 (3d Cir. 1976), and *St. Louis Shipbuilding & Steel Co.* v. *Casteel*, 583 F.2d 876 (8th Cir. 1978), involved Board remand orders that required only the mechanical or ministerial computation of the amount of benefits due. See *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 233 (1958) (judgment that specifies the means

for determining the amount of damages is final); *Goodwin* v. *United States*, 67 F.3d 149, 151 (8th Cir. 1995) ("judgment may be final 'if only ministerial tasks in determining damages remain'") (citation omitted); *Turner* v. *Orr*, 759 F.2d 817, 820 (11th Cir. 1985) (same), cert. denied, 478 U.S. 1020 (1986). By contrast, in LHWCA cases in which liability has been found but the amount of damages remains in dispute pending a remand, the courts of appeals have consistently denied review of the Board decision. See *WMATA*, 824 F.2d at 95; *Jacksonville Shipyards, Inc.* v. *Estate of Verderane*, 729 F.2d 726 (11th Cir. 1984) (per curiam); *Sun Shipbuilding*, 535 F.2d at 760. And, here, whether petitioner will ultimately be liable at all depends on further fact-finding on remand.

Mijangos v. *Avondale Shipyards, Inc.*, 948 F.2d 941, 944 (5th Cir. 1991) (cited by petitioner at Pet. 15-16), is not only consistent with the decision of the court of appeals in this case but demonstrates why judicial review of the status issue is unnecessary at this time. In *Mijangos*, the Board reversed an ALJ decision and remanded to the ALJ, who made additional findings of fact and issued a second order, which the Board then affirmed. On appeal, the Fifth Circuit reviewed the Board's remand, found it erroneous, and reinstated the ALJ's original decision. In so doing, the court of appeals reasoned that Section 10(c) of the Administrative Procedure Act (recodified at 5 U.S.C. 704), logic, and due process necessitate review of interlocutory Board orders when a party seeks judicial review after issuance of a final order. Accord *Van Dyke* v. *Missouri Mining, Inc.*, 78 F.3d 362, 365 (8th Cir. 1996); *Burns* v. *Director, OWCP*, 41 F.3d 1555, 1561-1562 (D.C. Cir. 1994); *Sun Shipbuilding*, 535 F.2d at 761 n.10. That rule comports with the more general one that "a party is

entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted); cf. 5 U.S.C. 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."). The proposition that an interlocutory order may be reviewed following issuance of a final order and invocation of court of appeals jurisdiction is, of course, far different from the one petitioner urges here—that an interlocutory order may be reviewed before a final order has issued. Indeed, the fact that review of the Board's interlocutory decision on the status issue will be available once there is a final order in this case explains precisely why there is no need for immediate review of the interlocutory order.

3. This Court lacks jurisdiction over the other issues raised by petitioner because the court of appeals correctly held that it lacked jurisdiction over petitioner's appeal. See *Steel Co.* v. *Citizens for a Better Env't*, 118 S. Ct. 1003, 1012-1013 (1998). Even if this Court had jurisdiction, the Court ordinarily would not pass in the first instance on issues that were not decided by the court of appeals. See, *e.g.*, *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993). In any event, the other issues that petitioner presses concern the Board's resolution of the status question (see Pet. i-ii, 17-22), which closely resembles the question this Court decided in *Chesapeake & Ohio Railway* v. *Schwalb*, 493 U.S. 40 (1989). The Court's review of that highly fact-bound question as applied to the facts of this case is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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